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Before The  
Federal Communications Commission  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In the Matter of

PETITION FOR DECLARATORY RELIEF  
IN THE FORM OF CLARIFICATION OF  
SECTION 317 OF THE COMMUNICATIONS  
ACT OF 1934 REGARDING SPONSORSHIP  
IDENTIFICATION ANNOUNCEMENTS FOR  
INFOMERCIALS

RM-7984

To: The Commission

PETITION OF  
CENTER FOR THE STUDY OF COMMERCIALISM  
CENTER FOR MEDIA EDUCATION  
CONSUMER FEDERATION OF AMERICA  
TELECOMMUNICATIONS RESEARCH AND ACTION CENTER  
FOR DECLARATORY RELIEF REGARDING SPONSORSHIP  
IDENTIFICATION ANNOUNCEMENTS FOR INFOMERCIALS  
WHICH DO NOT COMPLY WITH THE REQUIREMENTS OF  
THE COMMUNICATIONS ACT

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## SUMMARY

This petition asks the Commission to confront the problem of inadequate sponsorship-identification announcements for program-length commercials, now commonly known as infomercials. Prior to 1984, the Commission regulated program-length commercials through individual complaint proceedings and commercial programming time limits. With the deregulation of commercial television in 1984, however, these constraints were lifted and the industry witnessed a remarkable rebirth.

The problem of inadequate sponsorship identification arises through the exploitation of perceived gaps in the sponsorship-identification rule. Infomercial producers and broadcasters apparently interpret the rule as allowing for minimal identification within a thirty-minute commercial. The result is deception: consumers and viewers are misled into believing that infomercials are not commercials, but are instead news or entertainment. This result runs counter to the Communications Act and to the Commission's rules, and should be stopped.

Petitioners ask the Commission to address this problem through a declaratory ruling that the Act and current Commission rules require continuous sponsorship identification for the broadcast of infomercials. Only such a ruling can vindicate the Act's requirement of "full and fair" disclosure.

Petitioners also ask the Commission to apply this ruling to cable television. Such a ruling is necessary given the prevalence of infomercials on cable, and is allowed under the Cable Act of 1984.

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## PETITION FOR DECLARATORY RELIEF

### I. Introduction

Petitioners, the Center for the Study of Commercialism,<sup>1</sup> the Center for Media Education,<sup>2</sup> the Consumer Federation of America,<sup>3</sup> and the Telecommunications Research and Action Center,<sup>4</sup> respectfully petition the Commission for issuance of a declaratory ruling under Section 317 of the Communications Act of 1934 that the current practice of airing program-length commercials, or infomercials, without a continuous sponsorship identification announcement violates Section 317 of the Act as well as the Commission's rules requiring full and fair disclosure of sponsorship, 47 C.F.R. §§ 73.1212(e), 76.221(e).

This declaratory ruling should make clear that the Commission's rules allowing only one sponsorship identification

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<sup>1</sup> The Center for the Study of Commercialism is a non-profit corporation founded in 1990 devoted to researching, documenting and publicizing instances of excessive intrusion of commercial interests into the lives of the nation's citizenry. The Center is a membership organization located in Washington, D.C.

<sup>2</sup> The Center for Media Education is a public interest policy and research organization established to promote the democratic potential of the electronic media.

<sup>3</sup> The Consumer Federation of America (CFA) is a confederation of over 200 consumer organizations. CFA represents consumer interests before the U.S. Congress, federal regulatory agencies, and the courts.

<sup>4</sup> The Telecommunications Research and Action Center (TRAC) is a national organization with dues-paying members located throughout the country. TRAC seeks to educate consumers on telecommunications matters, and to promote the interests of its members through advocacy before governmental agencies and the courts.

in "broadcast matter advertising commercial products or services," 47 C.F.R. §§ 73.1212(f) and 76.221(f), do not apply to infomercials. Finally, the Commission should rule that compliance with Section 317 requires that the infomercial be accompanied by a continuously visible announcement identifying the program as an advertisement.

Should the Commission decide that it cannot accomplish these ends by means of a declaratory ruling, petitioners request the initiation of rulemaking. Petitioners request that the Commission initiate a rulemaking to consider revising its rules to require continuous sponsorship identification for program-length commercials.

Current sponsorship identification requirements for commercial advertisements are ineffective when applied to infomercials. Infomercials have slipped through a regulatory gap produced by the history of FCC regulation and deregulation of television. Only Commission action can fill this gap and guarantee full and fair disclosure of sponsorship in the infomercial market.

## II. Current Practices For Sponsorship Identification In Infomercials Are Inadequate.

The infomercial is a lengthy commercial, generally one half hour in duration, which is presented in a non-traditional format. Infomercials commonly mimic talk shows, cooking or self-help programs, or even investigative news programs. An integral component of most infomercials is the direct-sales pitch. This

pitch is made either as part of the apparently non-commercial format (i.e., it is made by the program's "host") or in discrete segments within the infomercial -- segments which are more obviously commercials. This formatting strategy creates the perception that the infomercial is not really a commercial at all, but rather a news or entertainment program.<sup>5</sup>

This perception is fostered by inadequate sponsorship identification practices. Typically, an infomercial will be identified as a commercial only sporadically -- often at the beginning of the half-hour program, and sometimes also prior to each ordering opportunity.<sup>6</sup> This type of identification, while sufficient for more traditional commercials, is inadequate given the unique nature of the infomercial.

There are several elements to the infomercial's novelty. First is its uncharacteristic length -- generally thirty minutes. Unlike the typical thirty-second spot which is easily recognizable by viewers as a discrete sales message, the infomercial preys upon the unsuspecting viewer's assumption that any program one half hour in length could not be an advertisement. These assumptions are further manipulated when

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<sup>5</sup> See generally, Consumer Protection and Infomercial Advertising: Hearing before the Subcomm. on Exports, Tax Policy, and Special Problems and the Subcomm. on Regulation, Business Opportunities, and Energy of the Committee of Small Business, 101st Cong., 2nd Sess. 65-81, (May 18, 1990). (Statement of Rader Hayes, Asst. Prof., University of Wisconsin). See also, Editorial, Advertising Age, April 15, 1991, at 26.

<sup>6</sup> See "Infomercials: Can Viewers Tell the Difference?," Broadcasting, April 16, 1990, pp. 61-62.

the infomercial takes on the form of standard programming fare -- such as a talk show or investigative news program -- that the short-length commercial can never attain because of its brevity. Finally, infomercials are typically aimed at stimulating on-the-spot purchases. In contrast, the overriding purpose of the typical commercial is to enhance consumer awareness of a product or to induce the consumer to switch brands. The infomercial format achieves this goal by including direct order instructions within the advertisement. These sales messages often appear to be separate, independent "commercials" within the framework of the entire infomercial, contributing to the false impression that the other parts of the infomercial are regular programming.

These unique attributes combine to render current sponsor identification practices ineffective. Sponsorship identifications are a service to the public only to the extent that viewers actually see and read them. The fact that infomercials are sixty times longer than the typical thirty-second spot greatly increases the chance that viewers will not see or hear any sponsorship identification that is quickly flashed on the television screen.

Modern viewing habits further undermine the effectiveness of current practices. It is well known that viewers are likely to miss brief disclosures at the very beginning or end of a program.<sup>7</sup> Moreover, television viewers tend to switch channels

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<sup>7</sup> See Chester and Montgomery, "Counterfeiting the News," Columbia Journalism Review, May/June 1988, at 38.

often, sampling from a variety of programs. This phenomenon -- known as "flipping" or "grazing" -- is the typical viewing pattern of 34% of all television viewers (equivalent to 54 million people).<sup>8</sup> A few scattered identifications per program do not suffice to inform the public, because viewers are extremely likely to miss such announcements. As more and more people subscribe to cable television, and as the use of remote control technology spreads, this percentage will increase substantially.

A final reason why current sponsorship identification practices are ineffective for infomercials is rooted in format. Viewers are conditioned to believe that news, entertainment and advertising material are clearly separated in the media. The infomercial format -- often mimicking news or talk show programs -- preys upon that preconception. The current practice of sporadic, minimal identification announcements fosters this illusion.

As a result of this conjunction of factors, infomercial viewers are often misled into believing that they are watching news or entertainment programming rather than advertising.<sup>9</sup> This effect runs counter to the spirit and purpose of Section 317 of the Communications Act and the Commission's own requirement of

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<sup>8</sup> Goldrich, "JWT Study Cites 'Flip' Side of TV Commercials," Backstage, Oct. 17, 1986, at 1.

<sup>9</sup> See Woller, "Infomercials Draw Regulators Attention," Gannett News Service, Feb. 15, 1991 (NEXIS).



"full and fair" disclosure.<sup>10</sup> Disclosure is hardly "full" when it is designed to be missed by large segments of the viewing population; nor is it "fair" to give only one (or even two or three) sponsorship-identification announcements over the course of a thirty-minute "show" which involves direct-sale pitches.

The Commission has, in the past, required broadcasters to alter identification announcements that are designed to be ineffective by virtue of small size or brief appearance.<sup>11</sup> More recently, the Commission has initiated rulemaking proceedings regarding effective sponsorship identification for political advertisements -- proposing to interpret Section 317 as imposing specific size and duration requirements for the identification announcement.<sup>12</sup> The same problems are posed by infomercials, and a similar response is called for. This unique advertising format demands a unique solution.

## II. Historical Patterns Of Regulation Have Created A Regulatory Gap That Permits Inadequate Sponsorship Identification In Infomercials.

The infomercial problem arises out of a regulatory gap that itself is the product of an historical pattern of regulation by the Commission. The Commission's rule governing commercial-

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<sup>10</sup> 47 C.F.R. § 73.1212(e).

<sup>11</sup> See, e.g., National Broadcasting Co., Concerning Sponsorship Identification, 27 FCC 2d 75 (1970).

<sup>12</sup> Codification of the Commission's Political Programming Policies, Notice of Proposed Rulemaking, 56 Fed. Reg. 30526 (July 3, 1991).

sponsorship identification was adopted well before program-length commercials appeared. When program-length commercials first emerged in the 1960s and 1970s, the Commission utilized the "public interest" standard, logging requirements, and quantitative commercial guidelines to preclude their broadcast, and these commercials disappeared from the airwaves. These tools were abandoned by the Commission as part of the 1984 deregulation of television, and the infomercial blossomed unrestricted by any limit other than the requirement to make one sponsor identification per commercial -- even when the commercial is thirty minutes long.

In recent years, Congress, the FTC, and even the infomercial industry have addressed isolated problems relating to infomercials, but these efforts have neither stemmed the tide of infomercials nor adequately addressed the issue of sponsorship identification.

A. The History Of FCC Regulation And Deregulation Of Program-Length Commercial Programming Has Created A Regulatory Gap.

Until 1973, the Commission controlled program-length commercials through individual complaint proceedings and the license-renewal process.<sup>13</sup> During this period, the Commission repeatedly found the broadcast of program-length commercials unacceptable. A series of opinions and orders held that the

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<sup>13</sup> See discussion in Commercial TV Stations, Report and Order, 98 FCC 2d 1076, 1078 (1984).

airing of program-length commercials improperly subordinated broadcasting in the public interest to programming based on salability, was inconsistent with Commission guidelines limiting commercial broadcasts, and resulted in violations of logging requirements.<sup>14</sup>

In 1973, the Commission adopted a guideline limiting commercial programming time to 16 minutes per broadcast hour.<sup>15</sup> With those guidelines in place, the need for specific individual decisions abated -- for it was now clear what the Commission considered unacceptable. The Commission further clarified its stance against program-length commercials with a Public Notice issued in 1974, which concluded that "the broadcast of program-length commercials ... involve[s] a serious dereliction of duty on the part of the licensee."<sup>16</sup> Accordingly, the program-length commercial entered a period of dormancy.

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<sup>14</sup> See generally Program Length Commercials, 39 FCC 2d 1062 (1973) (collecting cases).

<sup>15</sup> Order (Amendments to Delegation of Authority), 43 FCC 2d 638 (1973). This quantitative limit never reached the level of a rule. The Commission had already considered and rejected proposals for a quantified commercial limit. Notice of Proposed Rulemaking, 28 Fed. Reg. 5158 (May 23, 1963); Commercial Advertising Standards, 36 FCC 45 (1964). See also Television Overcommercialization, 49 RR 2d 391 (1981) (again rejecting quantified limitations on commercial broadcasts).

<sup>16</sup> Applicability of Commission Policies on Program-Length Commercials, 44 FCC 2d 985, 989 (1974).

These guidelines were eliminated in 1984,<sup>17</sup> and the program-length commercial resurfaced, now known as the "infomercial." Freed from regulatory constraints, the infomercial industry blossomed and grew with astonishing force.

B. The Infomercial Industry Has Expanded Rapidly Since The Deregulation Of Television.

Infomercials garnered approximately \$450 million in revenues in 1989 and are projected to gross \$1.6 billion in the period between 1990 and 1992.<sup>18</sup> Infomercial producers will buy close to \$300 million in television airtime in the next year.<sup>19</sup> According to a recent industry count, 90% of all U.S. stations now carry infomercials.<sup>20</sup>

The infomercial has spawned new networks which capitalize on infomercials for revenue enhancement and as a programming alternative.<sup>21</sup> These ventures are fueled by the growth of

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<sup>17</sup> Commercial TV Stations, supra n.13, recon. denied, 104 FCC 2d 385 (1986), rev'd in part, Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

<sup>18</sup> See Malt, "TV Infomercials Debated at Meet," Electronic Media, Oct. 29, 1990, at 6; Edelson, "Switching Channels," Women's Wear Daily, Nov. 1, 1991, p. 14 (noting estimates that infomercials will generate one billion dollars in sales in 1992).

<sup>19</sup> See Ryan, "Infomercials Get Audiences. Trade group Adopts Standards For Program Length Ads," Chicago Tribune, March 4, 1991, Business Section at 3.

<sup>20</sup> Comm. Daily, Feb. 1, 1991 at 10.

<sup>21</sup> One example is the Star Television Network. This is a satellite delivered direct marketing and programming venture comprised of thirty television station affiliates nationwide, reaching an estimated 20 million households. In exchange for programming, which consists mainly of "classic" television shows,

independent television stations which are always in need of inexpensive fare to fill the daily programming schedule.<sup>22</sup>

Likewise, since programming accounts for about 50% of a station's operating costs, start-up independents are increasingly turning to infomercials for quick and easy revenues in order to stay profitable.<sup>23</sup> In addition, recent downturns in the broadcasting market may lead to increased use of infomercials by the major broadcast networks and their affiliates.<sup>24</sup>

Broadcast stations are not the only media outlets affected by the infomercial explosion. Infomercials are frequently carried on cable as well. Indeed, this fall marked the inauguration of "Home Shopping Network Entertainment," a 24-hour channel devoted exclusively to infomercials.<sup>25</sup> This cable channel will initially broadcast directly to homes with satellite dishes, and Home Shopping Network plans on expanding by selling its service to cable operators and local broadcasters which can

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the affiliates broadcast infomercials in designated time slots and share in the revenues. "Star Launches Satellite-delivered Network of Infomercials and Entertainment," Comm. Daily, October 15, 1990, at 3.

<sup>22</sup> The number of independent stations has increased 300% in the last 9 years. Id. at 3.

<sup>23</sup> Id.

<sup>24</sup> Carter, "TV Networks, in a Crisis, Talk of Sweeping Changes," New York Times, July 29, 1991, p. D1, D6.

<sup>25</sup> Grossman, "Home Shopping Network Inc. Launching a TV Channel Devoted to 'Infomercials,'" The Wall Street Journal, August 19, 1991, p. B4; "Infonet Set to Begin TV Ad Program," The New York Times, August 20, 1991, p. D1; Comm. Daily, October 16, 1991, p. 7.

run all or part of the channel's all-day infomercial programming.<sup>26</sup> Another 24-hour cable infomercial channel is expected to begin in early 1992.<sup>27</sup> Other established cable networks, such as Lifetime and Black Entertainment Television, appear to rely heavily on infomercials to fill gaps in their programming schedules.<sup>28</sup> New FCC rules on syndicated exclusivity will fuel the expansion of infomercials on cable channels.<sup>29</sup>

The rapid expansion of outlets for infomercials is also changing the infomercial industry. The major infomercial producers have been small manufacturers and distributors who rely on infomercials as the sole means of selling their products. Now, major corporations like General Motors and Volvo are

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<sup>26</sup> See Grossman, *supra* n.25 at 19.

<sup>27</sup> Walley, "HSN's Infonet Set for Sept. 1 Launch," Electronic Media, August 26, 1991, p. 24.

<sup>28</sup> See Guy, "Great Reception for BET," USA Today, Oct. 31, 1991, p. 1B (infomercials account for one-third of BET programming).

<sup>29</sup> The syndicated exclusivity rules are designed to protect the contractual right of the local broadcaster in airing particular syndicated programming in his market. The local cable operator is prohibited from showing "imported distant signal" station programs(s) that the local broadcaster has the exclusive right to. Thus, many expect that multi-system operators will start to program more infomercials to replace the programming fare that is prohibited by the rule. This strategy is a logical economical alternative to going dark for thirty minutes. See "Infomercials: Can Viewers Tell the Difference?," Broadcasting, Apr. 16, 1990, at 61, 62.

entering the infomercial arena.<sup>30</sup> We should expect to see more infomercials than ever before as this transition takes hold.

C. Recent FTC Enforcement And Industry "Self-Regulation" Fail To Bridge The Regulatory Gap.

Over the past two years, the expansion of infomercials has drawn government attention in the form of Congressional hearings and sporadic regulatory intervention. These actions have, in turn, led the infomercial industry to announce "self-regulation" -- apparently in an attempt to forestall more substantial government action.

In 1990, Congress held hearings to investigate the infomercial industry and its effects on consumers.<sup>31</sup> Two House Subcommittees, led by Representatives Sisisky and Wyden, revealed that consumers need more protection against not only fraudulent infomercial claims but also sales pitches disguised as objective reporting.<sup>32</sup> The Subcommittees called upon advertisers and broadcasters to develop more stringent standards and encouraged tougher enforcement by the FTC.<sup>33</sup> In addition, both Sisisky and

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<sup>30</sup> See Advertising Age, April 15, 1991, at 26 (General Motors); Investor's Business Daily, October 15, 1991, at 3 (Volvo).

<sup>31</sup> See generally Consumer Protection and Infomercial Advertising, supra n.1.

<sup>32</sup> See Basik, "'Infomercials'" Create Broadcast Controversy," P.R. Services, Oct. 1990, at 32 (NEXIS).

<sup>33</sup> See "Congress Looks Into Infomercials," Broadcasting

Wyden agreed that on-screen labeling of the infomercial, to remind viewers they are watching an ad, would be the best way to cure the deception inherent in the infomercial format.<sup>34</sup>

Despite this attention, a survey of current FTC enforcement actions, and industry "self-regulatory" measures reveals a significant lack of protection for the consumer. The FTC has focused on fraudulent product claims and has taken a case-by-case approach to enforcement. Industry "self-regulation" is both inadequate and unenforceable.

1. FTC Enforcement Does Not Address The Sponsorship Identification Problem.

In the past two years, the Federal Trade Commission has initiated a handful of individual enforcement proceedings against fraudulent and deceptive infomercial producers.<sup>35</sup> The typical result in these individual proceedings is a consent agreement.<sup>36</sup> These agreements focus mainly on deceptive claims about products or services, although they also require some additional

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<sup>34</sup> See, Gallagher, "Infomercials - Controversial Marketing," Cincinnati Enquirer, Dec. 11, 1990; See also Broadcasting, May 28, 1990, at 66.

<sup>35</sup> The Federal Trade Commission's authority to regulate television advertising is based on Section 5 of the FTC Act which authorizes the Commission to take enforcement action against deceptive business practices. 15 U.S.C. § 45.

<sup>36</sup> See Consumer Protection and Infomercial Advertising, supra n.1, at 83 - 100 (Prepared Statement of the FTC).



disclosure of the fact that the infomercial is indeed an advertisement.<sup>37</sup>

The FTC approach cannot cure the deception inherent in the current infomercial format, not only because enforcement is always taken on a case-by-case basis, but also because the disclosure requirements imposed on producers are inadequate to the task of guaranteeing full and fair disclosure. Consent decrees typically require disclosure only at the beginning of the infomercial and prior to each ordering opportunity -- which is insufficient to the unique format of the infomercial.

More importantly, the FTC approach cannot address the problems posed by inadequate sponsor identification because that approach is limited to infomercials which contain deceptive product claims -- those infomercials which are not fraudulent will never be reached by the FTC, and will remain an ongoing problem. And because most FTC enforcement actions result in the discontinuation of the specific infomercials, the disclosure requirements are hypothetical, only applying to possible future broadcasts of an infomercial by the parties to the consent

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<sup>37</sup> In the infomercial realm, the FTC has two specific concerns: (1) to stop false and deceptive claims and, (2) to investigate misleading formats. The Commission has focused on fraudulent products or services rather than misleading format. See, Taylor, "FTC Probes program Length Commercials," Multichannel News," Nov. 7, 1988, at 13; Consumer Protection and Infomercial Advertising, supra n.1, at 83 - 100 (Prepared Statement of the FTC).

agreement.<sup>38</sup> Only FCC action can reach this much larger group of infomercials.

2. Industry "Self-Regulation" Does Not Adequately Address Sponsorship Identification.

In the face of Congressional and agency interest in the problems posed by infomercials, self-regulatory measures were recently adopted by the National Infomercial Marketing Association (NIMA), a trade group for the infomercial industry. These makers of the thirty-minute commercials claim that they will now police themselves.<sup>39</sup> Failure to follow these guidelines may lead to expulsion from the trade group -- a sanction ostensibly given weight by the risk of exclusion from NIMA's list of "members in good standing" which NIMA provides to broadcasters and cable companies.

The NIMA measures will not cure the problems inherent in the infomercial format. NIMA guidelines only require disclosure at the beginning and end of the infomercial, and -- as with FTC-ordered disclosure -- viewers are highly likely to miss them. In

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<sup>38</sup> See, e.g. Twin Star Productions, Consent Order to Cease and Desist, 55 Fed. Reg. 17494 (August 26, 1990) (text of proposed order), 55 Fed. Reg. 45656 (October 30, 1990) (notice of action, adopting proposed consent order) (prohibiting broadcast of several infomercials, and requiring specific sponsor identification if the respondents ever air other infomercials in the future).

<sup>39</sup> Specifically, the NIMA guidelines "require" a sponsor identification and also an announcement that the program is in fact advertising. The latter is to be aired at the beginning and end of each program, and prior to each ordering opportunity. See Wetzstein, "Ad-show Makers Set Ethics Standards," Washington Times, March 4, 1991, at B5.

addition, these guidelines have no real force: infomercial producers can ignore them without risking meaningful penalty.

### III. FCC Action Is Necessary To Guarantee Effective Sponsorship Identification For Infomercials.

The Communications Act requires broadcasters to identify the sponsors of broadcast material whenever a broadcaster receives valuable consideration in exchange for broadcasting a matter.<sup>40</sup> Section 317 applies to the broadcast of infomercials, which are broadcast in exchange for the payment of money by the product marketer to the broadcast station.

The FCC, implementing Section 317 of the Act, requires that this sponsorship identification "fully and fairly disclose the true identity" of the sponsor.<sup>41</sup> This requirement furthers the "spirit and purpose of section 317," which is "to inform listeners of the identity of those who are attempting to persuade them."<sup>42</sup>

Infomercials run afoul of this requirement by failing to include a continuous sponsorship identification. Currently, infomercials include only a few sporadic announcements during a thirty-minute advertisement. This practice violates Section 317

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<sup>40</sup> 47 U.S.C. § 317.

<sup>41</sup> 47 C.F.R. §73.1212(e).

<sup>42</sup> In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules, 34 FCC 829, 831 (1963); See also KOOL-TV 26 FCC 2d 42 (1970).

of the Act and the Commission's rule requiring full and fair disclosure.

A. Current Interpretations Of Section 317 Are Susceptible To Applications Which Conflict With The Act When Applied To Infomercials.

When the Commission's sponsorship-identification rules are applied to infomercials, an apparent conflict arises which allows for practices in violation of the Communications Act. Commission rule 73.1212(e) requires full and fair disclosure of sponsorship. But rule 73.1212(f) defines lawful disclosure in the commercial context so as to require only one mention of the product marketer. Infomercial broadcasters appear to be relying on the second rule to vitiate the effectiveness of the first.

These broadcasters appear to be operating under the assumption that the Commission's rule regarding commercial advertisement -- which requires only one sponsorship identification announcement during a commercial -- applies to infomercials. However, the rule for commercial advertisements was devised at a time when program-length commercials did not exist, and to apply that rule to infomercials is to eviscerate the obligation of "full and fair" disclosure.

To vindicate Section 317, the Commission should declare that only a continuous sponsorship identification within an infomercial can satisfy the requirements of the law. Petitioners therefore suggest a declaratory ruling that Section 73.1212(f) of the Commission's regulations does not apply to infomercials, and

that only a continuous sponsorship identification can satisfy Section 73.1212(e) and Section 317 of the Act. Alternatively, Petitioners asks the Commission to initiate a rulemaking proceeding to the same effect.

**B. The Commission Should Interpret Section 317, And Its Own Rules, To Require A Continuous Sponsor Identification For Infomercials.**

The unique problems posed by the infomercial can only be addressed by a requirement of continuous sponsorship identification. The length and format of the infomercial, in conjunction with contemporary television viewing patterns, renders anything less than continuous identification inadequate. Simply put, brief, sporadic announcements are ineffective in this context.<sup>43</sup> In contrast, a continuous sponsor identification will satisfy the goal of "full and fair" disclosure to the viewer. For no matter how long the infomercial, no matter how "noncommercial" it appears, and no matter when a viewer encounters it, the viewer will be put on notice that she is indeed seeing an advertisement rather than a news or entertainment program.

As a practical matter, the continuous sponsorship identification announcement need not explicitly identify the sponsor's identity at all times. If the Commission finds that such a rule may be too burdensome, it could require only that the

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<sup>43</sup> See Hayes, *supra* n.1.

continuous portion of the announcement alert the viewer to the essential fact that the infomercial is an advertisement.

While the precise wording of sponsorship identification is traditionally left to the discretion of the broadcaster,<sup>44</sup> Petitioners suggest the following as realistic options:

- (1) The word "advertisement" placed on top or bottom of the infomercial;
- (2) The word "advertisement" placed in a triangle in a corner of the infomercial;
- (3) A universally recognized logo placed in the corner of the screen.

Any of these options would be at once inobtrusive and effective, thus advancing the purpose of Section 317 without imposing unreasonable burdens on the broadcaster.

This approach, combined with an identification of the sponsoring individual or entity which could be required only at meaningful intervals, is consistent with the Commission's two-part interpretation of Section 317. The Commission's rules require broadcasters to announce (1) the fact that a matter is sponsored by some entity, and (2) the identity of that entity.<sup>45</sup> These two requirements are severable, and the proposed interpretation of Section 317 is consistent with existing interpretations of the content of required identification.

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<sup>44</sup> National Broadcasting Co., Concerning Sponsorship Identification, 27 FCC 2d 75 (1970).

<sup>45</sup> 47 C.F.R. § 73.1212(a)(1),(2).

C. The Proposed Interpretation Of Section 317 Is Consistent With Commission Practice.

The Commission has held that market changes are a critical factor in regulatory decision-making.<sup>46</sup> Deregulation of television was premised, in part, on the view that the market was constraining commercialization more efficiently than existing regulation.<sup>47</sup> As discussed above, deregulation itself unleashed market forces which have fundamentally altered this segment of the market. We are now in a radically different market than we were in forty, or even seven, years ago -- a market which requires the Commission to revisit the issue of sponsorship identification.

The requirements now found in Section 73.1212(f) have remained essentially unchanged over the past 40 years.<sup>48</sup> This rule applies to "programs advertising commercial products or services." Of course, the infomercial significantly post-dates the adoption of this language and could not have been an advertising format which was contemplated by the original rule.

While the provisions of this rule have not changed over time, the world of commercial advertising has changed. Specifically, program-length commercials have been resurrected

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<sup>46</sup> See, e.g. Commercial TV Stations, Notice of Proposed Rule Making, 94 FCC 2d 678 (1983).

<sup>47</sup> Commercial TV Stations, supra n.13.

<sup>48</sup> See Sponsor Identification of Broadcast Stations, 6 RR 835, 15 Fed. Reg. 6974 (1950); Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules, Report and Order, 34 FCC 829, 844 - 845 (1963).

and have transformed television advertising. This transformation has sapped the vitality of Section 317, and calls for regulatory action.

IV. Declaratory Relief Or Rulemaking Concerning Sponsorship Identification Of Infomercials Should Also Apply To Cable Television.

Similar transformations in the television industry call for an expansion of the Commission's rules to include cable television. Petitioners ask the Commission to consider the application of the sponsorship identification rules to cablecasting. Petitioners believe that such an application is within the Commission's authority, is consistent with past Commission actions, and is critical for the effective regulation of infomercials.

The Commission's authority to apply sponsorship-identification rules to cable derives from sections 303 and 317 of the Communications Act. Section 303 empowers the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."<sup>49</sup> Section 317 requires sponsorship identification and authorizes the Commission to create necessary rules and regulations.<sup>50</sup>

The Commission has already used this authority to apply the commercial sponsorship identification rules to cablecasters who

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<sup>49</sup> 47 U.S.C. 303(r).

<sup>50</sup> 47 U.S.C. 317.



engage in origination cablecasting.<sup>51</sup> In the political advertising context, the Commission has noted that the same sponsor identification rules should apply to broadcast and cable absent a reason for distinguishing between the two.<sup>52</sup>

In the case of infomercials, there is a compelling reason for application of new interpretations to cable. Cable is a major carrier of infomercials, and its role will grow in the future.<sup>53</sup> Effective regulation of infomercial sponsorship identification requires a ruling which applies to cablecasting as well as broadcasting.

Such a ruling would not violate the Cable Act of 1984. Section 544(f) of the Act prohibits the Commission from imposing "requirements regarding the provision or content of cable service, except as expressly provided." 47 U.S.C. 544(f). This prohibition bars the Commission from requiring or forbidding the carriage of specific programming, but allows regulation which is "content neutral."<sup>54</sup>

In United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia Circuit provided the definitive analysis of the scope and limits of the

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<sup>51</sup> Cable Television Report and Order, 36 FCC 2d 143, 238 (1972), modified on reconsideration, 36 FCC 2d 326 (1972).

<sup>52</sup> See, e.g. Amendment Of The Commission's "Sponsorship Identification" Rules, 52 FCC 2d 701, 712 (1975).

<sup>53</sup> See supra nn.25-29 and accompanying text.

<sup>54</sup> United Video, Inc. v. FCC, 890 F.2d 1173, 1188-89 (D.C. Cir. 1989).